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In the Supreme Court of the United States

OCTOBER TERM, 1980

NEW ENGLAND POWER COMPANY, APPELLANT

v.

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether a state statute that prohibits the transmission or sale of hydroelectric power generated in that state to other states without the authorization of the State Public Utility Commission, is preempted by the Federal Power Act and therefore violates the Supremacy Clause of the Constitution.

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INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

Part I of the Federal Power Act (16 U.S.C. (& Supp. II) 791a *et seq.*) accords the Federal Energy Regulatory Commission comprehensive licensing authority over the nation's water power resources in order to benefit interstate commerce. Part II of the Act gives the Commission regulatory rate-making authority over various aspects of the transmission and sale of electric energy in interstate commerce, including the transmission and sales from hydroelectric projects licensed under Part I.

This case presents an important question concerning the scope of permissible state authority within the federal regulation established by the Federal Power Act. Here, the New Hampshire Supreme Court held that a New Hampshire statute which prohibits the export of hydroelectric energy generated in that state, without the permission of the state public utility commission, was authorized by Section 201(b) of the Federal Power Act (16 U.S.C. (& Supp. II) 824(b)). The court's decision could have a substantial impact upon the Commission's future administration of the Act. If the decision below stands, the Commission will be required to administer the Federal Power Act in accordance with the terms and conditions placed by each state upon the transmission and sale in interstate commerce of electricity generated from the resources within that state. The United States and the Federal Energy Regulatory Commission believe that Congress did not intend the Commission's administration of the Federal Power Act

to be subordinated to such state administrative orders. Moreover, the New Hampshire court's decision sharply departs from the congressional policy to promote the regional pooling of energy producing resources, which the Commission has consistently encouraged in its attempts to provide nationwide coordination in the use of scarce energy resources. Thus, the United States and the Federal Energy Regulatory Commission have a substantial interest in this litigation.

STATEMENT

Appellant, New England Power Company (NEPCO), is a public utility which generates electric energy from six hydroelectric projects located on the Connecticut River in New Hampshire and Vermont. These projects are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act, 16 U.S.C. 792-823. The energy generated from the hydroelectric projects is transmitted and sold by NEPCO at wholesale in Massachusetts, Rhode Island, and New Hampshire in accordance with tariffs and rates approved by the Commission under Part II of the Federal Power Act, 16 U.S.C. (& Supp. II) 824-824k. Because NEPCO is a member of a highly-integrated regional power pool, which is operated as a single unit, the power it generates is transmitted throughout New England (J.S. App. 2a-3a).

On November 21, 1979, the New Hampshire Public Utilities Commission commenced an investigation under N.H. Rev. Stat. Ann. § 374:35 (1966 repl. ed.) to determine whether it should revoke its earlier approval of the exportation of electric power generated from appellant's hydroelectric facilities located in

New Hampshire. The state statute under which the Commission proceeded provides as follows:

> *Transmitting Electricity Out of the State Permission Required.* No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention to do so with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

After several hearings, the Public Utilities Commission withdrew the permission it previously had granted to appellant to transmit hydroelectric energy generated within New Hampshire outside the state (J.S. App. 2a). The New Hampshire Supreme Court upheld the state commission's order (J.S. App. 1a-14a). In so ruling, the court concluded that the Federal Power Act did not preempt the New Hampshire statute upon which the Commission based its order (J.S. App. 4a-8a). The court stated that the Commission's order did not conflict with the licensing power of the federal government under Part I of the Federal Power Act, 16 U.S.C. 792-823, because the

order "does not require compliance with [the state statute] as a condition precedent to securing a federal license under Part I" (J.S. App. 5a). In support of its conclusion, the court further observed that "New Hampshire has not sought to stop hydroelectric development of the Connecticut River and does not challenge the licenses granted to NEPCO over the years under Part I of the Federal Power Act" (*ibid.*).

The court further held that in Part II of the Federal Power Act, 16 U.S.C. (& Supp. II) 824-824k, Congress gave "express consent" (J.S. App. 11a) for the regulation prescribed by the New Hampshire statute. Although the court acknowledged that in enacting Part II of the Federal Power Act, Congress chose to fill the gap in the regulation of the interstate sale of electric power created by the constitutional limitations on state authority (see *e.g.*, *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83, 90 (1927)), it ruled that Section 201(b) of the Federal Power Act evidenced Congress' intention to allow the states to regulate in the manner provided by the New Hampshire statute. Pursuant to that provision, the Federal Power Act does not apply to intrastate sales of electric energy "or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *" (J.S. App. 6a-7a).

DISCUSSION

In upholding the State Public Utility Commission's order directing that appellant no longer had permission to transmit hydroelectric power generated in New Hampshire to other states, the New Hampshire Court acknowledged that "it might be questionable,

in the absence of [Section] 201(b) of the Federal Power Act, that there would be authority for New Hampshire to interdict the flow of electricity that would otherwise continue to benefit two sister States * * *" (J.S. App. 10a). But Section 201(b) does not sanction such state parochialism at the expense of other states. Indeed, the Federal Power Act was designed to prevent such parochialism. Thus, the decision below presents important questions with respect to the scope and degree of preemption by the Federal Power Act over the transmission and sale of electrical energy in interstate commerce that warrant plenary review by this Court.

1. As this Court observed almost 40 years ago, the central thrust of Part I of the Federal Power Act was to promote the comprehensive development of water power, "in so far as it was within the reach of the federal power to do so." *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946).[1] Section 23(b) of the Act, 16 U.S.C. 817(b), prohibits construction of nonlicensed hydroelectric projects on navigable streams, regardless of the effect on commerce, and further requires those proposing a project on a nonnavigable stream to file a declaration of intention and to come before the Federal Energy Regulatory Commission for a determination of whether the "interests of interstate or foreign commerce would be affected." By employing the standard "affect the interests of commerce, * * * Congress drew upon its full authority under the Commerce Clause." *FPC* v. *Union Electric Co.*, 381 U.S. 90, 96 (1965).

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[1] Part I of the Federal Power Act was enacted in 1920 as the Federal Water Power Act. See *FPC* v. *Union Electric Co.*, 381 U.S. 90, 91 n.2 (1965).

Section 10(a) of the Act, 16 U.S.C. 803(a), requires all licensed projects to be "* * * such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *." The statute thereby undertakes "to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation * * *." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 181. As the Court there stated in referring, *inter alia*, to the "comprehensive plan" standard of Section 10a, "[t]he detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls" (*ibid.*; footnote omitted).

In Part II of the Federal Power Act, enacted in 1935, Congress authorized the Federal Energy Regulatory Commission (then the Federal Power Commission) to regulate the transmission and sale of electrical energy at wholesale in interstate commerce. This part of the statute was enacted in response to a series of decisions culminating in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), which had "denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 214 (1964). With the growth of electric utilities which crossed state boundaries, Congress found it necessary to exercise federal authority to fill the regulatory gap created by *Attleboro*. See S. Rep. No. 621, 74th Cong., 1st Sess. 17 (1935); H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7-8 (1935). "Part II is a direct result of *Attleboro*. [The two] are to be read together. The

latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953).

2. It is, therefore, plain that the decision below construing Section 201(b) of the Federal Power Act as authorizing New Hampshire to regulate the sale outside the state of hydroelectric power generated within New Hampshire is incompatible with the exclusive federal regulatory jurisdiction established by Part I of the Federal Power Act.

Here, appellant's six hydroelectric generating systems are licensed by the Federal Energy Regulatory Commission under Part I of the Federal Power Act. These licenses are issued on the condition, *inter alia*, that the project "* * * will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce * * *" (16 U.S.C. 803(a)). Hence, New Hampshire's proscription against the sale of power outside the state is squarely at odds with the federal policy upon which appellant's projects were licensed, viz., that these hydroelectric stations would benefit interstate commerce. To permit New Hampshire to bar the interstate sale of such power would vest it with a virtual "veto power over the federal project" and "would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal [Energy Regulatory] Commission." *First Iowa Hydro-Electric Coop.* v. *FPC*, *supra*, 328 U.S. at 164.

Contrary to the New Hampshire Supreme Court's suggestion (J.S. App. 5a), the fact that the state commission's order does not require compliance with

N.H. Rev. Stat. Ann. § 374:35 (1966 repl. ed.) as a condition precedent to obtaining a federal license under Part I does not save the order. That suggestion views Part I of the Federal Power Act much too narrowly. Part I does not simply authorize the federal authorities to grant licenses; it bespeaks a policy of benefitting interstate commerce and rests the licensing authority on that policy. Because the state commission's order thwarts that policy by attempting to retain all the benefits of the projects within New Hampshire, it cannot stand. As the Court stated in the closely analogous context of natural gas regulation, "although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision that the orders must be declared a nullity to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Northern Natural Gas Co.* v. *Kansas Commission*, 372 U.S. 84, 92 (1963).[2]

3. The New Hampshire Public Utilities Commission's order is also flatly at odds with Part II of the Federal Power Act. That portion of the statute, as we have explained (*supra*, pages 6-7), grants author-

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[2] Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not undermine our submission that Part I of the Federal Power Act preempts the state commission's order. By its terms, Section 201(b) applies only to Part II of the Federal Power Act. But even if the "lawful authority" of the states over the exportation of hydroelectric energy preserved by Section 201(b) has any application to Part I of the Act, it is plain that the provision simply permits the states to license those projects on non-navigable streams that do not "affect" interstate commerce. Section 201(b) does not authorize state authority of the type involved in this case over what are projects indisputably located on a navigable waterway such as the Connecticut River.

ity to the Federal Energy Regulatory Commission over the interstate transmission and wholesale of electrical energy. The New Hampshire order invades that authority. By its terms, it withdraws permission for appellant to sell hydroelectric power generated in New Hampshire outside the state (see J.S. App. 2a). Since the energy generated in New Hampshire is dispatched through a regional power pooling system (NEPOOL) (see J.S. App. 3a), it would be impossible to comply with the literal terms of the state commission's order without elaborate alteration of the regional power transmission lines. Hence, the New Hampshire Supreme Court anticipated that compliance would be achieved by "arrangements" that "may naturally flow from the export termination" such as "new rates, contract modifications, or accounting adjustments" (J.S. App. 14a).[3]

It is of course settled since at least *Attleboro* that the states have no authority to set rates or to modify contracts with respect to the interstate transmission and wholesale of electrical energy. Part II of the Federal Power Act filled the regulatory gap, and, after declaring that "Federal regulation of [such] matters * * * is necessary in the public interest" (16 U.S.C. 824(a)), granted to the Federal Energy Regulatory Commission "jurisdiction over all facilities for such transmission or sale of electric energy" (16 U.S.C. (& Supp. II) 824(b)(1)). The teaching

[3] Thus, the New Hampshire Supreme Court construed the Public Utilities Commission's order as requiring that all of the economic benefits of the hydroelectric power—which is cheaper than electricity produced from oil-fired generators—must be assigned to New Hampshire consumers, rather than requiring that appellant terminate the transmission of power with the regional power pool (J.S. App. 11a-12a).

of *Attleboro* is that the states have no constitutional power to regulate interstate transmission and wholesales of electrical energy. Thus, in passing Part II of the Federal Power Act in 1935, Congress intended to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941).

Section 201(b) of the Federal Power Act, upon which the decision below relied (J.S. App. 4a-8a), does not support New Hampshire's claim. It states that—

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not * * * deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line * * *.

The language of Section 201(b) makes clear that it is not, as the Supreme Court of New Hampshire mistakenly held, an affirmative grant of authority empowering the states to bar the exportation of hydroelectric energy. By its terms, it simply leaves standing, beyond the preemptive reach of the Federal Power Act, those constitutionally valid state laws that govern hydroelectric facilities. Thus, Section 201(b) does not sanction the flat prohibition against exportation of electrical energy involved in the instant case. It merely permits the states to continue to exercise whatever "lawful authority" that might exist under the Constitutional holding in *Attleboro*. To

conclude otherwise would vitiate the comprehensive federal regulation over the transmission and sale of electrical energy in interstate commerce contemplated by the Federal Power Act, in response to the *Attleboro* decision. This federal regulation begins at precisely the point at which state regulation was constitutionally limited by that decision. Thus, Section 201(b) was designed to preserve only such "lawful authority" of the states as was not barred by the interpretation of the Commerce Clause in *Attleboro*.[4]

At all events, Section 201(b) does not authorize the "new rates, contract modifications, or accounting adjustments, [that] may naturally flow from the export termination" (J.S. App. 14a) ordered by the state commission. Since Congress gave such ratemaking authority to the Federal Energy Regulatory Commission, it could not have intended to allow any state activity in this sphere as well. Hence, Section 201(b) is no justification for New Hampshire's attempt, through modification of contract rights and rate structures, to gain all of the economic benefits of its hydroelectric power at the expense of its regional neighbors.

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[4] Section 201(b) did not appear in the original Senate bill but was inserted in the House bill, as Congressman Rogers explained (see J.S. App. 7a), in order to insure that certain states were not deprived of rights which they then exercised over the exportation of hydroelectric energy transmitted across state lines. 79 Cong. Rec. 10527 (1935). While the House Report discusses this section of the bill, it does not indicate that the change from the Senate version of the bill was intended to be a substantive change. H.R. Rep. No. 1318, 74th Cong., 1st Sess. 27 (1935). See also *United States* v. *Public Utilities of California*, *supra*, 345 U.S. at 300-301 n.4.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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